Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1975

NO. 75-1816

PAUL LABRIOLA,

Petitioner,

-against-

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK APPELLATE DIVISION, FIRST JUDICIAL DEPARTMENT

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari be issued to review the judgment of the Supreme Court of the State of New York, Appellate Division, First Judicial Department, entered in the above entitled matter on February 26, 1976 (not yet officially reported)

A. OPINION BELOW

The trial court rendered two opinions below. The first thereof was rendered by Mr. Justice Roberts on September 16, 1974, wherein the original motion to suppress was denied. Said opinion (not officially reported) is appended to this petition as Appendix A.

Following the reopening of the hearing, the Court adhered to its original determination. This opinion (not officially reported), is appended hereto as Appendix B.

No opinion was rendered by the Appellate Court, which unanimously affirmed the judgment below without opinion on February 26, 1976. That Court's order of affirmance of the judgment of conviction is appended hereto as Appendix C.

No opinion was rendered by the New York Court of Appeals since that Court denied permission to appeal to that Court by its certificate dated

March 18, 1976. A copy thereof is appended to this petition as Appendix D.

B. THE GROUNDS UPON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

The judgment sought to be reviewed herein is the judgment of the Appellate Division, First Judicial Department of the Supreme Court of the State of New York, made on February 26, 1976, and appended hereto as Appendix C.

Jurisdiction in this Court is invoked under Title 28, United States Code, Section 1257 (2) and Rule 19, subdivision 1 of the rules of this Court.

C. THE QUESTIONS PRESENTED FOR REVIEW

1. Did the failure of the prosecution to amend the eavesdropping warrant "as soon as practicable" after discovering that petitioner who was not named in the warrant was being intercepted requiring a suppression of the evidence thereby obtained.

2. Was the eavesdropping warrant of July 27, 1972 obtained without probable cause as to petitioner.

3. Did the failure of the prosecutor to serve a timely 90 day notice of termination of eavesdropping upon petitioner, require suppression of the evidence obtained under various eavesdropping warrants.

4. Did the trial court err in refusing to reopen the eavesdropping hearing to consider the issue of the continued eavesdropping by the police beyond the hourse unequivocally specified in the eavesdropping warrant of July 27, 1972.

D. THE CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The statutes involved are New York Criminal Procedure Law, Section 700.15, 700.20, 700.50 and 700.65 and Amendments IV and XIV of the United States Constitution and Article 1 Section 6 of the New York State Constitution.

The pertinent portions are set forth in Appendix E of this petition.

E. A CONCISE STATEMENT OF THE CASE AND THE MATERIAL FACTS PERTAINING TO THE CONSIDERATION OF THE QUESTIONS PRESENTED.

1. Petitioner was convicted on December 9, 1974 upon his pre-trial plea of guilty to Forgery in the First Degree, before the Hon. Justice Roberts in the New York State Supreme Court, County of New York.

Prior to the entry of the plea of guilty extensive pretrial hearings were conducted before Mr. Justice Roberts upon motions to controvert various eavesdropping warrants issued out of the Supreme Court of Kings County (Vetrano, J.) and to suppress the evidence of the conversations intercepted pursuant to said warrant. The warrants authorized both telephonic interception and "bugging" of oral communications.

Subsequent to the entry of the plea and the sentencing of the defendant, similar hearings were

held in the United States District Court for the Eastern District of New York arising out of the same warrants which had formed the basis of a Federal prosecution against this petitioner and others*.

Based upon facts revealed at those federal hearings, petitioner moved before Justice Roberts in the State Court to reopen the original hearing before hime in order to raise 2 issues not previously raised in the State Court viz, the timeliness of the 90 day notice of termination of the eavesdropping and further, the legal affect of continued bugging by the police beyond the hours specified in the eavesdropping warrant.

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* Petitioner was thereafter convicted in the Federal Court following the denial of motions to suppress the conversations intercepted under the same warrants. That conviction was affirmed by the United States Court of Appeals for the Second Circuit, March 4, 1976 and is the subject of a separate petition for certiorari involving the same warrants and the same issues. Said petition for certiorari is presently pending in this Court, sub judice under petition no. 75-1394
It is requested that said petition be considered together with the instant petition.

The trial court reopened the hearing solely with respect to the 90 day notice issue, but refused to reopen the hearing with respect to the issue involving the bugging beyond the hours specified in the warrants. The Court thereafter adhered to its original determination denying all motions to controvert the warrants and to suppress evidence thereby obtained.

Thereafter all of these materials were the subject of a timely appeal to the Appellate Division, First Department, of the Supreme Court of the State of New York. That Court, on February 26, 1976 unanimously affirmed the judgment below without opinion. Thereafter a timely application was made to the New York Court of Appeals seeking leave to appeal to that Court. On March 18, 1976, Hon. Sol Wachtler, an Associate Judge of the Court of Appeals, denied permission to appeal to that Court, but noted in his certificate, denying leave, that the various constitutional issues raised upon the appeal

below were argued as part of the application for leave to appeal to the New York Court of Appeals.

Petitioner is presently incarcerated pursuant to said judgment of conviction.

F. THE STAGES OF THE PROCEEDINGS IN WHICH THE ISSUES INVOLVED WERE RAISED AND THE MANNER IN WHICH THEY WERE RAISED

1. The issue with respect to the validity of the eavesdropping warrants (Points One and Two) were raised by timely pretrial motions in accordance with the Criminal Procedure Law of the State of New York.

2. The issues with respect to the 90 day notice and the bugging after the hours specified in the orders (Points Three and Four) were raised subsequent to the sentencing as a result of information derived from the hearings of the same warrants in the Federal Court. The State trial court, thereafter reopened the hearing to the extent of hearing the 90 day issue, but refused

to reopen it with respect to the issue relating to bugging after the hours specified in the various warrants.

G. ARGUMENT AMPLIFYING THE REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

(See next page)

POINT ONE

THE EAVESDROPPING WARRANT DATED JULY 5, 1972 WAS EXECUTED IN VIOLATION OF PETITIONER LABRIOLA'S CONSTITUTIONAL AND STATUTORY RIGHTS. THE EVIDENCE THEREBY OBTAINED SHOULD BE SUPPRESSED AS WELL AS THE EVIDENCE OBTAINED UNDER THE FOUR EAVESDROPPING WARRANTS THEREAFTER OBTAINED AS A RESULT THEREOF.

On July 5th, 1972, Mr. Justice Vetrano, sitting in Supreme Court, Kings County, signed a warrant authorizing the District Attorney of New York County to intercept telephone conversations over a semi-public telephone, number 377-9840, at S.L.A. licensed bar in Brooklyn known as the 1-2-3-4 Club.

The warrant was predicated upon allegations by Assistant District Attorney, Leonard Newman that one Joseph Martino, acting under the code name "Paul", was using that telephone to converse with an alleged informant named Stanley Reinhardt for illicit dealing in the alleged Unlawful Possession and Sale of certain U.S. Postal Bearer Bonds and unspecified Industrial Bonds.

The warrant authorized the interception of Martino's conversations over said telephone and "his co-conspirators, agents and associates", in connection with the aforementioned crimes.

Although the warrant was effective for 30

days commencing July 5th, it was not implemented until July 11th, because the subject telephone was out of order until July 11th.

Prior to implementing the order, the police officers who were to overhear and record the telephone communications were instructed to listen to previously obtained recordings of conve sations between Reinhardt and Martino in order to become familiar with the voice of Martino.

Additionally, Seargent Bicina, who was supervising the interceptions, was told by Assistant District Attorney Newman to instruct his men not to record privileged or social conversations, but to record:

> "all conversations with respect to Joseph Martino, a person known to us at that time as "Ralph" and that anyone who responded to the name of "Paul" when that number is called, and discussed the theft of negotiation or disposition of stolen securities, or anyone calling that number and engaging in conversations with the inside parties about the theft or disposition as to the disposition or negotiation of stolen securities."

Newman further testified as to instructions given him by dealing with conversations by persons named Paul. He stated:

> "Q. Now, did you give them any instructions as to what they were

> to do if somebody called Paul and answered the phone and they realized that is your people overhearing the conversation realized that the Paul who answered the phone was not Joe Martino?
>
> "A. If that person who responded to the name Paul when called, if he was engaged in a conversation concerning stolen securities in any respect whatsoever, that call was to be recorded."

The police also undertook a surveillance of the 1234 Club. They learned, by July 6th (prior to commencing telephone interception) that Paul Labriola frequented the Club and had a police record involving stolen checks.

On July 11th, the telephone interception began. Among the calls intercepted that day were three to a party named "Paul". The voice of "Paul" was the same in all three calls. Detective Huller did not know who either party was.

Although the tapes of telephone conversations between Reinhardt and Martino were readily available to the officers overhearing the 1234 Club telephone, they never listened to it after the tap was installed to compare the voice of Martino with the voice of "Paul" on the 1234 tap to ascertain whether "Paul" was the Martino named in the July 5th warrant or some other "Paul" who was not named in the order.

Detective Huller, after listening to the entire first conversation between the unknown

"Paul" and the unknown other party, said he didn't know whether the conversation pertained to his investigation.

Huller also listened to the entire second conversation on July 9th, although he did not know who "Paul" or the other party was. He stated that there was no reference to industrial bonds or postal bonds which were the subject of the eavesdropping warrant. He attempted to justify his listening to the conversation by saying that he felt reference to the "piece" as "I.D's" would have had a bearing on the case.

The third conversation was also recorded without knowing who the parties were. Huller described the conversations as "cryptic" because there was reference to "I had to get somebody out" and "Did he pick up the things he was supposed to pick up?" As Huller put it "That could have a bearing. I don't know what, but possibly it could."

Huller testified that Detective Boyle, after hearing "Paul" arrange over the tapped phone to meet someone, followed "Paul" to the appointed place.

On July 12th, two more conversations of the same "Paul" were intercepted in toto between "Paul" and one "Ted".

The entire first conversation simply related to one of the parties arranging to meet the other at "Nick's" in 15 minutes.

The second conversation of July 12th was an unkown male calling into "Paul". The unknown

male said "They paid them" and I need a couple of bucks", Paul arranged to meet the unknown male at a candy store.

Huller, although stating that he wanted to know who "Paul" was and whether the voice was Martino's, acknowledged that he would have listened to the entire conversation even if it turned out not to be Martino. (Huller still did not bother to listen to the Reinhardt tapes containing Martino's voice to compare it with the voice he was intercepting at the 1234 Club.

Huller then left the plant immediately after hearing "Paul" arrange to meet the unknown male at a candy store on Coney Island Avenue. He followed the man who left the 1234 Club to the place referred to in the tapped conversation. The man was Paul Labriola.

Huller later informed Seargent Bicina that the "Paul" they were tapping was probably Paul Labriola and not Joseph Martino.

On July 14th, he intercepted a conversation between Paul Labriola and a person he believed was Joseph Martino at the 1234 Club. He, now admittedly knew that the "Paul" he had been recording on the wire tap was not in fact the Joe Martino referred to in the July 5th warrant.

Thus by certainly no later than the 4th day of the intercepting calls, and perhaps as early as the 2nd day of interception, the police knew they were tapping the conversation of a party not named or authorized to be tapped in the July 5th warrant, to wit, the conversation of Paul Labriola.

At this point the police were under a constitutional as well as a statutory mandate to discontinue tapping Labriola's conversations until they obtained a warrant to intercept Labriola's conversations.

The police, however continued to intercept Labriola's conversations between July 14th and July 27th without obtaining a warrant authorizing such tapping.

More specifically, between July 14th and July 27th, Detective Huller and his fellow officers intercepted and recorded twenty (20) completed phone conversations to which Labriola was a party. None of the other parties to whom Labriola spoke were known to the police.

Seargent Bicina testified that by July 13th, or in any event not later than July 14th, he informed Assistant District Attorney Charles Clayman (who was supervising the investigation) that based on a series of tapped conversations he now felt that "it was Paul Labriola and not the Joe Martino known as "Paul" whose conversations they had been intercepting and "we felt that there should be an amendment" Clayman replied that it would be done when the order was due for renewal.

Thus on July 14th the District Attorney (after only four days of intercepting conversations) delayed seeking a modification of the warrant until July 27th - a thirteen day period in which they continued without abatement or minimization to unlawfully intercept Labriola's conversations. In fact on July 14th, Assistant District Attorney, Clayman specifically instructed Bicina to none-

theless continued to intercept Labriola's conversations.

Two of those post July 14th conversations were submitted in support of the amended order signed by Judge Vetrano on July 27th (see Point Two, supra).

The issue here presented is whether the police had a constitutional right to continue, without applying for an amended order, to intercept Labriola's telephone conversations up to July 27th where they knew by July 12th or at the latest July 14th, that Paul Labriola was not in fact Joseph Martino (a/k/a Paul), that was named by Mr. Justice Vetrano in his July 5th warrant.

Certain preliminary observations are in order in considering this issue:

(a) The July 5th warrant was predicated exclusively upon information relating to the theft of specifically described Postal Bearer Bonds and an undetermined quantity of "industrial" bonds. No other type of stolen property is described in the affidavit or the warrant.

Thus the conversations to be intercepted must be deemed limited to authorizing only "a particular description of the type of communications sought to be intercepted" (Criminal Procedure Law §700.30). To allow the scope of the warrant to go beyond such limitations would result in a constitutionally prohibited general warrant (U.S. Const., Amendments 4 and 14; N.Y. Constitution Article 1, §6 and 12; Berger v. New York, 87 S. Ct. 1873, 388 U.S. 41).

(b) The two July 21st conversations recorded and submitted to Mr. Justice Vetrano on July 27th in support of the amended order to include Labriola as a party whose conversations might be intercepted were clearly conversations outside the scope of the July 5th warrant.

By Mr. Clayman's own affidavit of July 27th those conversations could have related to stolen checks or any other kind of stolen security (affidavit, p. 4). Indeed Mr. Clayman's affidavit of July 27th (P. 5) interprets the conversation of July 21st to refer to some new future theft of an unspecified quantity of undescribed securities -- certainly not under any interpretation the previously stolen Postal Bonds or industrial securities.

Thus the intercepted conversations related to crimes not specifically referred to in the July 5th order. As such, an amended order should have been obtained "as soon as practicable" after July 12th or certainly after July 14th. Yet the District Attorney when apprised of this by Seargent Bicina in July 13th or July 14th, deliberately and consciously determined not to seek an amendment until July 27th and specifically directed that the wiretapping of Labriola's conversations nonetheless continue unabated.

Accordingly, we respectfully urge that the conversations of Paul Labriola, intercepted under the July 5th order and all those which followed be suppressed as well as any evidence derived therefrom.

POINT TWO

THE EAVESDROPPING WARRANT OF JULY 27, 1972 ISSUED BY MR. JUSTICE VETRANO, WAS NOT SUPPORTED BY PROBABLE CAUSE AS TO PAUL LABRIOLA

Mr. Justice Vetrano had originally issued a warrant for eavesdropping, dated July 5, 1972. The order did not name Paul Labriola. During the course of the eavesdropping under that warrant, the police intercepted various calls alleged to be those of Paul Labriola. Predicated upon those interceptions (see Point One, supra), the District Attorney of New York County applied for a further warrant, renewing and amending the July 5th warrant, so as to include Paul Labriola. On July 27, 1972, Mr. Justice Vetrano granted that order, which now included authority to install a bug into the 1234 Club, as well as to continue previously authorized wiretapping.

It is, of course, axiomatic that an order for eavesdropping must be predicated upon probable cause. Additionally, the probable cause must appear within the four corners of the supporting affidavits when, as in the present case, the court took no further testimony or evidence prior to issuing the order.

Turning then to the July 27th order, we note the following with respect to its applicability to Paul Labriola.

The factual affidavit supporting the order

was that of Assistant District Attorney Charles Clayman. After reciting the prior order of July 5th, he went on to indicate that two conversations of a person described as "Paulie" were intercepted pursuant to the prior warrant. The first of these conversations referred to in paragraph 2(b) at pages 3 and 4 of Mr. Clayman's affidavit was as follows:

> "At 2:55 p. m. on July 21, 1972, Paulie (co-conspirator of Joe Martino, see paragraphs 23 and 24 of July 3, 1972 affidavit) made the following outgoing call.

Paulie (In)	I'll meet you 9 o'clock at Coney Island "L&M"
Leon (Out)	Heh Heh
In	The luncheonette
Out	Yeah yeah what's new otherwise
In	Oh nothing
Out	Did you get what you were suppose to get?
In	We're getting them. He's got them, and we're getting tonight, so eh remember that thing that you needed that little stamp, do you still have it?
Out	Eh come again
In	Do you know the thing you needed the last time the stamp
Out	I needed
In	Yeah remember the last batch a long time ago
Out	Oh yeah yes yes yes yes yes
In	Do you still have that stamp?
Out	Eh' yes I have it right here

"In	Oh good because that's what we need
Out	That one with the eh
In	Yeah
Out	Wait wait a minute, wait a minute, I have the one with the date.
In	That's the one we need
Out	What about the other one
In	That one we needed the last time, we need again because they've the same thing."

To begin with we note that there is no allegation that the "Paulie" referred to is claimed to be Paul Labriola. Moreover, the conversation is between "Paulie" and a person named Leon. It must be born in mind that the original warrant authorized only the interception of calls involving Joe Martino and his co-conspirator, and that must be limited, for constitutional purposes, to the specific crimes being investigated, namely, allegedly stolen postal bearer bonds and industrial bonds.

Thus, it is immediately apparent that the parties named in the original order are not the parties to this conversation. Moreover, the conversation cannot be regarded as one having anything to do with United States postal bonds or industrial bonds.

The conversation, at most, is highly equivocal from which no inference of criminal conduct can or should be constitutionally permissible. The purported interpretation that stamps are used in connection with stolen bonds can give rise, at most, to a suspicion of improper

conduct, but even that is nothing more than a surmise. To hold otherwise, would be to hold that a conversation in ordinary English language, on its face innocuous could become a basis for probable cause merely on the subjective opinion of a Police Officer seeking to convert a guess into a factual basis at the level of probable cause. In any event, it must not be overlooked that the conversation in no way can give rise to an inference that the subject matter under discussion is postal bonds or industrial bonds as opposed to any other bonds if indeed it can be interpreted by any stretch of the forensic imagination to relate to bonds at all.

Even assuming that the quoted conversation could relate to criminal conduct involving stolen bonds other than postal bonds or industrial bonds, it would necessarily have to be treated as evidence of a new crime, not the subject matter of the original warrant and, consequently must be suppressed because the District Attorney did not obtain the amended order "as soon as practicable". (Criminal Procedure Law, Section 700.65: Point One, supra).

The second quoted conversation, occurring later the same day and found in paragraph 2(c), page 5 of Mr. Clayman's affidavit sheds no further light on the issue of probable cause. That conversation, in its entirety is as follows:

"At 10:25 p.m. on July 21, 1972, Paulie received the following call:

Joe	When you send the other thing put in an envelope but put tissue around it

Paul	I got the blank but I don't know if the other guy is around to type it up
Joe	Send it airmail special delivery. Send it to 160-20 Sepulveda Blvd. That's my name your using Joe Antonakes. I ran into something out here, I think I got something real big in the broke. It's worth about 200 big ones. I'll see you next week. Who do you have to wait for? Leon.
Paulie	Yeah he has to do the typing I met Leon tonight."

The arguments previously urged as to the first conversation are again applicable here.

Once again, the District Attorney sought to raise a conversation essentially innocuous on its face when taken literally, to the constitutional level of probable cause by interpreting the words "something real big in broke" as a criminal conversation allegedly dealing with stolen securities in brokerage houses and their shipment through the mail in the future. Objectively viewed, as it must be, the proposed interpretation is in reality, to paraphrase an old saying, a case of evil being in the eye of the beholder. Constitutional standards have always required an objective interpretation rather than a subjective one. From the point of view of objective interpretation, one can offer any number of interpretations of that conversation, ranging from the sublime to the ridiculous and come no closer to probable cause than the merest of surmise and conjecture.

The order on its face, patently lacks a fac-

tual basis for probable cause to believe that Paul Labriola was a conspirator of Joseph Martino in connection with the claimed theft and possession of stolen postal bonds or stolen industrial bonds (Criminal Procedure Law, Sections 700.15, 700.20 and 700.25; Title 18 U.S. Code,,Section 2518; U.S. Constitution Article 4 and 14; New York State Constitution Article 1, Paragraph 6 and Paragraph 12).

It is therefore respectfully urged that the warrant of July 27, was not properly issued. Such warrant along with the succeeding warrants authorizing eavesdropping as to Paul Labriola should be held to be invalid and the evidence obtained thereunder or derived therefrom should therefore be suppressed in their entirety.

POINT THREE

THE FAILURE OF THE DISTRICT ATTORNEY TO SERVE THE STATUTORY 90 DAY NOTICE UPON THE APPELLANTS FOLLOWING THE TERMINATION OF THE EAVESDROPPING IN THE 1234 CLUB REQUIRES THAT THE EVIDENCE OBTAINED UNDER THE JULY 27th ORDER AND THOSE WHICH FOLLOWED BE SUPPRESSED

This phase of the case deals with Section 700.50 subd. 3 of the Criminal Procedure Law which provides that "in no case later than 90 days after the termination of an eavesdropping warrant or expiration of an extension order", written notice must be personally given to each person named in the warrant.

The pertinent facts dealt in this matter are the following:

1. On July 5th Mr. Justice Vetrano issued the first of a series of 5 eavesdropping warrants. That first order did not name petitioner Labriola.

2. On July 27th, Mr. Justice Vetrano amended and extended the July 5th order so as to include petitioner Labriola.

3. Three subsequent orders were thereafter issued each in turn dependent upon the prior order.

Det. Huller testified at the hearing that in executing the July 27th order for eavesdropping at the 1234 Club the eavesdropping plant was shut down and no further eavesdropping was undertaken after September 1st.

The reason for the termination was because the police knew that the 1234 Club was closed and nobody was there.

It is our contention herein that since the eavesdropping was deliberately terminated by September 1st the petitioner Labriola thereafter within 90 days from September 1st was entitled to the statutory notice pursuant to Criminal Procedure Law Section 700.50. Mathematically computed the 90 day period following September 1st would terminate on November 29th.

The minutes of the Supreme Court proceedings wherein the notices were served upon Labriola indicate that such service, occurred on December 13th, 1972, two weeks after the expiration of the 90 day period.

People v. Huston, 34 N.Y. 2d 116, 356, N.Y. Sub. 2d 272. New York Court of Appeals dealt with the question of giving the statutory notice. Judge Rabin writing for a unanimous court said at 34 N.Y. 2d 121:

> "The People admit that they did not give the written posttermination notice required by the statute. While we may assume that the lack of such notice might ordinarily require suppression of the evidence obtained as a result of the warrant (see People v. Tartt, 71 Misc. 2d 955, 336 N.Y.S. 2d 919, supra), we believe that the special circumstances present in this case

"compel a different conclusion."

The Court than detailed the unique circumstances which governed its decision in this case. The case at bar however, presents no such extraordinary situation upon which the government can rely to relieve itself of the fault. The underlying juridical philosophy applicable here are in words expressed in U.S. v. Giordano, 469 F. 2d 522, 530:

> "We cannot relegate provision after provision to oblivion by terming each a mere 'techincality' - or else we leave the statute a shadow of itself, an apparition without substance'".

An interesting corollary is found in the case of Olmstead v. U.S., 277 U.S. 438, 458, 48 S.Ct. 564, 575:

> [when]"government becomes a law breaker, it breeds contempt for law".

See also People v. Kennedy, 75 Misc. 2d 10 347 N.Y. Supp. 2d 327.

It is therefore respectfully submitted that the failure to give the 90 day notice was a matter of substantial right designed to prevent the Government from encroaching upon constitutionally guaranteed rights of privacy by giving notice of recent eavesdropping to persons named in an eavesdropping warrant.

It would therefore follow that the evidence obtained under the July 27th order of Mr. Justice Vetrano and those which follow it and which are dependent upon it should be suppressed.

POINT FOUR

THE COURT BELOW ERRED IN REFUSING TO RE-OPEN THE EAVESDROPPING HEARING TO CONSIDER THE ISSUE OF THE CONTINUAL EAVESDROPPING BY TH E POLICE BEYOND THE HOURS SPECIFIED BY MR. JUSTICE VETRANO IN HIS SECOND ORDER, DATED JULY 27, 1972

Mr. Justice Vetrano's second eavesdropping order (dated July 27, 1972) which named petitioner as a person whose conversations were to be intercepted within the 1234 Club, specifically provided that such bugging "not occur after 7:30 A. M. on any day..."

At the original hearing, counsel requested the log entries of petitioner's intercepted conversations The District Attorney objected. The Court granted the application only to the extent of directing the prosecution to turn over the log reports of conversations intercepted under the first order of July 5, 1972.

Subsequently, petitioner learned during the hearings before Judge Costantino in Federal Court, that the police continually intercepted petitioner's

conversations in the 1234 Club well beyond the 7:30 P. M. cut-off period specified in Judge Vetrano's second order, dated July 27th.

Judge Costantino then held:

> "All conversations overheard after 7:30 P. M. in violation of the court order of July 27, 1972 are hereby suppressed."

Thereafter petitioner moved to reopen the eavesdropping hearing before Mr. Justice Roberts. Counsel's affidavit in support of that application stated:

> "With respect to the bugging issue, your affirmant had made numerous requests for all of the logs involved in the eavesdropping orders. The District Attorney opposed that application and the Court originally denied application. Subsequently, the Court permitted counsel to have those logs which pertained to the first wiretapping order, leaving further logs to be delivered only if deemed necessary by the Court. As matters developed [the assistant district attorney] Mr. Genge advised your affirmant that the logs involved in the second order (the bugging order) were not necessary because there was no intention, upon that particular trial to offer any of the conversations obtained as a product of the bugging. Upon reliance thereon, your affirmant made no further demands for the logs of the bugged conversations."

The motion was denied.

As further indicated in counsel's affidavit in support of the motion to reopen the eavesdropping hearing before Mr. Justice Roberts:

> "The evidence can be presented briefly and without undue delay. Essentially it will consist of the logs of the bugged conversations, which, on their face indicate the continuous bugging after the 7:30 P.M. [and] the testimony of the police officers to confirm the post -7:30 P.M. bugging...."

We respectfully urge that the second order of Mr. Justice Vetrano, dated July 27, 1972 was blatantly and inexcusably violated by the police. The circumstances thereof should have been inquired into by the Court below and the legal effects upon motion to suppress should have been decided by that Court.

In People v. Holder, 331 N.Y.S. 2d 863, the Court referring to a failure to follow minimization during a court ordered wiretap stated at page 570:

> ""The intercept was never cut off and the surveilling agent did not even attempt 'lip service' compliance with the statutory mandate, but rather

> "completely disregarded it..... from the record before this Court, at appears that the police intended to glean every conceivable shred of relevant conversation from every telephone call and thus they turned the eavesdropping warrant into a general search warrant and totally disregarded the direction in the warrant..... Such a practice cannot be countenanced by this Court."

The Court suppressed all the conversations intercepted in the Holder case (supra) stating that "only by imposing such a severe penalty will compliance in the future be guaranteed".

If this Court sanctions the actions of the prosecution in a case such as this it will be permitting court approved violations of an individual's Fourth Amendment Rights.

There can be but one remedy in a situation such as this; that is, total suppression of each and every conversation intercepted as well as those developed following these improperly seized conversations.

We respectfully urge that the original hearing below should be reopened and an evidentiary hearing

held to determine the circumstances and legal consequences of the continued bugging after the cut-off hour specified in Judge Vetrano's order.

CONCLUSION

THE PETITION FOR CERTIORARI HEREIN SHOULD BE GRANTED

Dated: Brooklyn, New York
June, 1975

Respectfully submitted,

EVSEROFF & SONENSHINE
Attorneys for Petitioner

WILLIAM SONENSHINE, ESQ.
Of Counsel

APPENDIX- A

OPINION OF MR. JUSTICE ROBERTS
DENYING MOTION TO SUPPRESS

SUPREME COURT : NEW YORK COUNTY
TRIAL TERM : PART 42

----------x

THE PEOPLE OF THE STATE
OF NEW YORK

-against- Indictment No.
6550/72

PAUL LABRIOLA,

Defendant.

----------x

BURTON B. ROBERTS, J. :

Defendant Paul Labriola has moved to suppress evidence obtained as a result of two electronic eavesdropping orders for wiretaps on telephone number 377-9840, located inside a bar known as the 1-2-3-4 Club located at 1234 East 15th Street, Brooklyn. The first order, dated July 5, 1972, authorized the interception of the conversation of one Joe Martino and his co-conspirators, including one "Ralph", relating

to the procurement and distribution of stolen securities. The second order, dated July 27, 1972, was in the nature of a renewal and amendment of the first order, with the only pertinent addition being the naming of the defendant, Paul Labriola, as a co-conspirator whose conversations, along with those of Martino, "Ralph" and the co-conspirators of all three men, were thereby authorized to be intercepted. (The second order also provided for the installation of an electronic "bugging" device inside the 1-2-3-4 Club. No seperate issues have been raised with respect to this aspect of the second order.)

Defendant's motion addressed to the issuance of the wiretap conceded the validity of the first order as far as the interception of conversations of Martino and "Ralph" with each other or with third parties were concerned, (Transcript, p. 3). He contended, however, that the

officers monitoring the wiretap under the first order did not have the right to intercept the conversation of anyone else, including defendant, with third parties and that, as a result, the second order, which was based in part upon the presentation of these conversations to the issuing Justice, was therefore invalidated. He also maintained as a seperate argument that the police officers who executed the wiretaps failed to minimize the interception of non-pertinent conversations, rendering the entire body of evidence obtained from these wiretaps inadmissible. See e.g. United States v. Tortorello, 480 Fed. 764 (2d Cir. 1973).

As a result of these contentions, this Court conducted an evidentiary hearing into the circumstances under which the two eavesdropping orders were obtained and executed. This hearing included testimony by two Assistant District At-

torneys who obtained the order and supervised its execution, testimony by the monitoring police officers, a playing of all relevant conversations obtained under the first order and an examination by the Court of logs kept by the monitoring officers. As the evidence developed during the course of this hearing, various new contentions by the defendant were made as old ones were apparently put to rest by the evidence. As the matters further unfolded, even these new defense contentions changed like Sahara's shifting sands, with the result being that the issues presently before me are not clearly defined. What can only be done now, therefore, is to deal with so many of the original issues recited above and the points clearly raised in defendant's written brief as are worthy of comment.

The following constitutes this Court's findings of fact and conclusions of law. According to the affidavit of Assistant District Attorney Newman

in support of the application for the first order, Martino stated to the informant that if he himself did not answer the subject telephone, he would receive messages left over that telephone under the code name of "Paul". This fact, taken together with what defendant concedes was the sufficient probable cause to tap Martino's operation for the disposition of stolen securities over the telephone, gave the issuing Justice probable cause to believe Martino had confederates or, at the very least, helpful individuals who would accept messages from callers interested in the securities. Accordingly, I conelude from an examination of the affidavit in support of the July 5th order that it properly authorized the interception of conversations over the subject telephone to which Martino and "Ralph" were not a party. United States v. Kahn, U.S. , 94 S. Ct. 977 (Feb. 19, 1974,) cited by the People

in support of this conclusion, is directly in point and controlling here. Additionally, the evidence at hearing revealed that at the time the first order was obtained and during at least the initial period of its execution the law enforcement officials invilved reasonably believed that the name "Paul" was either an alias used by Martino or a code word used by Martino and his associates to identify callers who were interested in stolen securities. Inasmuch as defendant's first name was Paul and he identified himself as such over the telephone, the police had the right to begin to listen to his conversations over the subject phone until their subject matter was established. Of course, once he began talking about stolen securities, his status as a member of the conspiracy, in addition to Martino and Ralph, was sufficiently established and his pertinent conversations with anyone were subject to interception

under the order. Moreover, the tapes themselves further revealed that on July 14th, the fourth day after installation of the tap, the officers intercepted a pertinent conversation between the defendant, Martino and Ralph which established the relationship of the three as co-conspirators. Certainly, after this point, the defendant's status as a member of the conspiracy was clear and his pertinent conversations with anyone were subject to interception under the order.

Defendant contends that as soon as his identity as co-conspirator became known, the authorities had the obligation to immediately amend the July 5th order to name him before they could listen to any of his further conversations with third parties. There is no such requirement to perform what amounts to a merely ministerial act. (CPL § 700.65; People v. DiLorenzo, 69

Misc 2d 645.) Defendant was named in the second order. No claim is made here that the People failed to comply with the provision of the statute governing the giving of notice.

Defendant also contends that the authorities failed to properly amend the first order to include conversations pertaining to industrial bonds, arguing that the probable cause for that order dealt with stolen postal bearer bonds. This statement is factually incorrect, inasmuch as the Newman affidavit revealed to the issuing Justice that Martino had stated to the informant that he also had industrial bonds for sale. The order itself was, properly, unrestricted as to the exact species of stolen securities that would be pertinent. It is clear that an amendment is unnecessary for each transaction which is part of a common criminal enterprise and defined by the same Penal Law provisions. United States v. Tortorello, 480

Fed. 764, 782-783 (2d Cir. 1973).

After listening to the witnesses who testified at the hearing, I find that the monitoring officers were properly and adequately instructed by Assistant District Attorney Newman and Sargeant Bocina as to how they were to minize the interception of conversations which were not subject to proper interception under the first order. After listening to the tapes and examining the logs, I find that the police exercised exemplary good faith in minimizing the interception of non-pertinent conversations and that the orders were properly executed.

For the foregoing reasons, the defendant's motions are in all respect denied.

The Clerk of the Court is directed to forward a copy of this order to the District Attorney and to the attorney for the defendant.

Dated: September 16, 1974

BURTON. ROBERTS
J.S.C.

APPENDIX -B

ORDER OF AFFIRMANCE ON APPEAL

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York on February 26, 1976.

Present-Hon. Harold A. Stevens, Presiding Justice
Harold Birns
Samuel J. Silverman
Louis J. Capozzoli
J. Robert Lynch, Justices.

The People of the State of New York, Respondent,	:	Order of Affirmance on Appeal from Judgement
-against-	:	1928-30
PAUL LABRIOLA, Defendant-Appellant.	:	

Appeals having been taken to this Court by the defendant-appellant from the judgment of the Supreme Court, New York County (Burton B. Roberts, J.), rendered on December 9, 1974, convicting him of the crime of forgery in the first degree (2 counts), and from two orders of said Court entered on March 14 and May 14, 1975, denying defendant's motions to reopen the suppression hearings, and said appeals having been

argued by Mr. William Sonenshine of counsel for the appellant, and by Mr. Amelia C. Anzalone of counsel for the respondent; and due deliberation having been had thereon,

It is unanimously ordered and adjudged that the judgment and orders so appealed from be and the same are hereby, in all things, affirmed. The case is remitted to the Criminal Term of the Supreme Court, New York County, which shall direct defendant to surrender himself in order that execution of the judgment shall be commenced or resumed
(CPL § 460. 50 (5).

E N T E R :

HYMAN W. GAMSO
Clerk.

Counsel for appellant is referred to § 606. 5 , Rules of the Appellate Division, First Department.

APPENDIX-C

CERTIFICATE DENYING LEAVE TO APPEAL

STATE OF NEW YORK
COURT OF APPEALS

BEFORE: HON. SOL WACHTLER, Associate Judge

The People of the State of New York,

-against-

CERTIFICATE DENYING LEAVE

PAUL LABRIOLA

I, SOL WACHTLER, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460. 20 and upon the record and proceedings herein, * there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at Mineola, New York
March 18, 1976

Associate Judge

* Description of Order: Judgment of Supreme Court, New York County, December 9,

CERTIFICATE DENYING LEAVE TO APPEAL
Continue

1974; affirmed by Appellate Division, First Department, February 26, 1976. All those issues including those involving federal Constitutional questions which are raised before the Appellate Division were argued as a part of the application for leave to appeal to this Court.

APPENDIX-D

OPINION OF MR. JUSTICE ROBERTS
ON MOTION FOR RE-HEARING

SUPREME COURT : NEW YORK COUNTY
TRIAL TERM : PART 42

----------x

THE PEOPLE OF THE STATE
OF NEW YORK

-against- Indictment No.
6550/1972

PAUL LABRIOLA,

Defendant.

----------x

BURTON B. ROBERTS, J.:

On consent of the District Attorney, defendant's motion to suppress evidence obtained as the result of electronic eavesdropping, heretofore denied by this Court, has been reopened to include the issue of whether the notice given defendant pursuant to CPL § 700.50(3) on December 13, 1972 was timely.

Defendant contends that "since the eavesdropping was deliberately terminated by Septem-

ber 1st, the defendant was thereafter within 90 days from September 1st, [i.e. by November 29, 1972] entitled to the statutory notice pursuant to Criminal Procedure Law Section 700.50."

Upon consideration of this issue, the decision denying defendant's motion to suppress is adhered to. While prior eavesdropping warrants were in effect until September 2, 1972 and were not immediately renewed, it appears that on September 11, 1972 the issuing Justice issued a further eavesdropping warrant for the same telephone, individuals, subject matter and premises as prior orders, which was in effect between September 12, 1972 and October 10, 1972, and pursuant to which communications were intercepted. This latter warrant contained provision postponing any notice to be given pursuant to the prior warrants until the termination of the newly reundertaken eavesdropping. I conclude,

therefore, that the reasonably prompt recommencement of eavesdropping for the same telephone, individuals, subject matter and premises which occurred here constitutes "exigent circumstances" for the postponement of notice pursuant to CPL § 700.50(4). I conclude further that the only logical interpretation of the intent and effect of the postponement provision contained in the September 12th warrant was to permit notice of any prior eavesdropping to be served within a ninety-day period of the October 10th termination date of the September 12th warrant, i.e., by January 7, 1973. Hence, the notice given December 13, 1972 was valid.

The Clerk of the Court is directed to forward a copy of this decision to the attorney for the defendant and to the District Attorney.

Dated: May 14, 1975 BURTON B. ROBERTS
J.S.C.

APPENDIX- E

§700.15 Eavesdropping warrants; when issuable

An eavesdropping warrant may issue only:

1. Upon an appropriate application made in conformity with this article; and

2. Upon probable cause to believe that a particularly described person is committing, has committed , or is about to commit a particular designated offense; and

3. Upon probable cause to believe that particular communications concerning such offense will be obtained through eavesdropping and;

4. Upon a showing that normal investigative procedures have been tried and have failed, or rasonably appear to be unlikely to succeed if tried, or to be too dangerous to employ; and

5. Upon probable cause to believe that the facilities from which, or the place where, the communications are to be intercepted, are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

§700.20

***2. The application must contain:

(a) The identity of the applicant and a statement of the applicant's authority to make such application; and

(b) A full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an eavesdropping warrant should be issued, including (i) a statement of facts

establishing probable cause to believe that a particular designated offense has been, is being, or is about to be committed, (ii) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of the communications sought to be intercepted, and (iv) the identity of the person, if known, committing such designated offense and whose communications are to be intercepted; and***

§700.50

***3 Within a reasonable time, but in no case later than ninety days after termination of an eavesdropping warrant, or expiration of an extension order, except as otherwise provided in subdivision four, written notice of the fact and date of the issuance of the eavesdropping warrant, and of the period of authorized eavesdropping, and of the fact that during such period communications were or were not intercepted, must be personally served upon the person named in the warrant and such other parties to the intercepted communications as the justice may determine in his discretion is in the interest of justice. The justice, upon the filing of a motion by any person served with such notice, may in his discretion make available to such person or his counsel for inspection such portions of the intercepted communications, applications and warrants as the justice determines to be in the interest of justice. ***

§700.65

***4. When a law enforcement officer, while engaged in intercepting communications in the manner authorized by this article, intercepts a

communication which was not otherwise sought and which constitutes evidence of any crime that has been, is being or is about to be committed, the contents of such communications, and evidence derived therefrom, may be disclosed or used as provided in subdivisions one and two. Such contents and any evidence derived therefrom may be disclosed or used as provided in subdivisions one and two. Such contents and any evidence derived therefrom may be used under subdivision three when a justice amends the eavesdropping warrant to include such conetents. The application for such amendments must be made by the applicant as soon as practicable. If the justice finds that such contents were otherwise intercepted in accordance with the provisions of this article, he may grant the application.

Constitution of the U. S.

Amendment [IV]

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

Constitution of the U. S.

Amendment XIV

***No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State depirve any person of life, liberty or property, without due process of law; nor deny to any person

within its jurisdiction the equal protection of the laws. ***

New York State Constitution

Article 1 §6

No person shall be deprived of life, liberty or property without due process of law.

Supreme Court, U. S.
FILED
JUL 23 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1975

No. 75-1816

PAUL LABRIOLA,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-1816

PAUL LABRIOLA,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Preliminary Statement

Paul Labriola seeks a writ of certiorari to review an order of the New York State Appellate Division, First Department, entered February 26, 1976. *People* v. *Labriola*, 51 A.D.2d 713 (1st Dept. 1976). By this order, the Appellate Division affirmed, without opinion, petitioner's December 9, 1974 conviction upon his plea of guilty, rendered in the Supreme Court of New York County, for two counts of FORGERY IN THE FIRST DEGREE (New York Penal Law §170.15). Petitioner was sentenced to concurrent, indeter-

minate seven-year terms* and is presently incarcerated. On March 18, 1976, the Hon. SOL WACHTLER denied an application for leave to appeal to the New York State Court of Appeals.

On March 4, 1976, the United States Court of Appeals for the Second Circuit (MOORE, FRIENDLY, OAKES, JJ.) affirmed petitioner's federal convictions for conspiracy to forge and utter United States savings bonds stolen from the mails, and forgery of United States savings bonds. In its opinion, the Second Circuit upheld the legality of the same wiretap orders which are challenged in the instant petition. *United States* v. *Principie,* 531 F. 2d 1132 (2d Cir. 1976). Labriola's petition for a writ of certiorari in that case is presently before this Court (No. 75-1394).

Introduction

In June, 1972, the New York County District Attorney's Office learned that Joe Martino, Ralph Principie and other unidentified persons were engaging in the acquisition and sale of stolen securities, and that in their illegal business they were using the telephone at a Brooklyn bar called the 1234 Club. The District Attorney of New York County sought an electronic eavesdropping order for the 1234 Club permitting the interception of the conversations of Principie, Martino and their co-conspirators concerning the acquisition and sale of stolen bonds. Justice LARRY VETRANO of

* On December 9, 1974, petitioner was sentenced to concurrent four-to-eight-year terms for the instant convictions. He was subsequently resentenced to concurrent indeterminate seven-year terms after it was determined that the original sentence was not authorized by New York law.

Kings County Supreme Court granted this order. Electronic surviellance began on July 11, 1972. Three days later, during monitoring pursuant to the warrant, it was discovered that petitioner Paul Labriola was a co-conspirator of Martino and Principie and that Labriola was using the telephone at the 1234 Club to engage in the acquisition and sale of stolen securities. Labriola was named as a party whose conversations were authorized to be intercepted in 4 subsequent extensions or renewals of the July 2 order. Conversations intercepted showed that petitioner was actively engaged in this scheme with Martino and Principie. Labriola was arrested on December 5, 1972.

Following the denial of petitioner's motion to suppress evidence obtained pursuant to the electronic eavesdropping warrants, Labriola entered a plea of guilty to two counts of forgery in the first degree, and was sentenced for these crimes.

On appeal to the Appellate Division, Labriola argued, as he does here, that the evidence obtained as a result of the electronic eavesdropping should have been suppressed because the People failed to amend the eavesdropping order to name him "as soon as practicable" after discovering that he was a co-conspirator of the parties named in the order; the warrant of July 27 was not issued upon probable cause; notice of eavesdropping orders was not given within 90 days of the termination of the last order; and the court erroneously denied his motion to reopen the suppression hearing.

THE SUPPRESSION HEARING

The People's Case

June, 1972: Commencement of the Investigation

On June 20, 1972 Leonard Newman, Assistant District Attorney and Chief of the Frauds Bureau in the New York County District Attorney's Office, had a conversation with a confidential informant, later identified as Stanley Reinhardt.* Reinhardt said that on June 15, 1972 he had received a telephone message to call "Paul" at 377-9840. This was the telephone number of a Brooklyn bar called the 1234 Club. "Paul" was a code name for Joe Martino, who had told Mr. Reinhardt that he could only be reached at that number by asking for "Paul," and that if he was not there, to leave a message for "Paul." (*See* Affidavit of Leonard Newman in Support of July 5th, 1972 Warrant, at 2-3.)

When Mr. Reinhardt spoke with Martino the next day, Martino said that he had nine United States Postal Bearer Bonds in denominations of $100,000, and that he was selling them for 25% of their face value. Martino gave the serial numbers of four of these bonds, and assured Reinhardt that they "would not be discovered missing until the end of the month." Mr. Reinhardt said he was coming to New York on June 20 and would call Martino at the 1234 Club at 1 p.m. (*See* Affidavit of Leonard Newman in Support of July 5th, 1972 Warrant, at 2-3.)

* *See* People's Exhibit 6A (Transcript of June 20, 1972, 8:30 p.m. conversation). This exhibit and the affidavits and other papers hereinafter referred to were part of the record on appeal in the Appellate Division.

On June 20, 1972 Mr. Reinhardt, acting in cooperation with the District Attorney's Office had three telephone conversations with Martino, who was at the 1234 Club. These conversations were recorded with Reinhardt's consent (Peo.'s Exh. 6A). During the first of these conversations, Martino said that the bonds he was offering for sale were four "brand new" Postal Bonds issued February 1 with a maturity date of 1977. The bonds were guaranteed to the end of the month, and there were two other persons interested in buying them. Later that day, during the second conversation, Mr. Reinhardt said he would speak to his "man," who was to buy the bonds, and then call Martino back. (*See* Affidavit of Leonard Newman in Support of July 5th, 1972 Warrant, at 3-4.)

During the third conversation of June 20, Martino said that there were other persons interested in buying the bonds and that Reinhardt would have to advance $4000 that night for one of the bonds. However, Mr. Reinhardt refused to advance the money. Also during this conversation, an individual Martino called "Ralph" [later identified as Ralph Principie] was heard in the background instructing Martino not to deliver the bonds to Mr. Reinhardt without receiving the $4000. (*See* Affidavit of Leonard E. Newman in Support of July 5th, 1972 Warrant, at 4.) Paul Labriola was at no time mentioned in these conversations, and, as Mr. Newman testified at the hearing, at that time he "knew of no connection" between Martino and Labriola (Newman: 16-17).*

* Parenthetical numerical references are to the minutes of the suppression hearing unless otherwise indicated.

In investigating the information provided by Mr. Reinhardt, on June 20, 1972, Mr. Newman contacted United States Postal authorities and was told that DuPont, Glore, Forgan, a stock brokerage firm, had received a $100,000 bond with a 1977 maturity date bearing one of the serial numbers supplied to Mr. Reinhardt by Martino. Mr. Newman spoke with an officer of the brokerage firm on June 22 and discovered that the bond bearing the serial number quoted by the Postal authorities was missing. Also missing were 30 other United States Postal Bonds totaling in excess of $1,000,000. These included three other $100,000 bonds bearing serial numbers supplied to Mr. Reinhardt by Martino. (*See* Affidavit of Leonard Newman in Support of July 5th, 1972 Warrant, at 5; *accord,* Newman: 5-6). The DuPont, Glore, Forgan officer also told Mr. Newman that, according to firm records, the bonds disappeared on June 12, 1972 and that an audit scheduled to take place at the end of the month would have uncovered this theft. As Mr. Newman observed in the affidavit he submitted in support of the application for an eavesdropping warrant, this information is consistent with Martino's statement to Mr. Reinhardt that the bonds were guaranteed until the end of the month. (*See* Affidavit of Leonard Newman in Support of July 5th, 1972 Warrant, at 5.)

On June 25, 1972 Mr. Reinhardt again received a call from Joe Martino, who said that he had one United States Postal Bearer Bond left, that the others were "out," and that he would try to get them back for Reinhardt. Martino said that the bonds had become "hot," and added that he also had a package of industrial bonds worth $175,000 for sale. (*See* Affidavit of Leonard Newman in Support of July 5th, 1972 Warrant, at 6.)

The investigation also included observations of the 1234 Club. On June 19th, Detective **Thomas Huller** and another officer went to the Club and knocked on the locked door. They were told by an unidentified individual inside that the Club was "not open to the public," and were refused entry. Further observations that day revealed that "known criminals" and persons with criminal records were entering and leaving the Club. Some of them were followed by police officers involved in this investigation. On the same day, officers observed a car in the area, which they discovered was registered to Paul Labriola, being driven by an unidentified male. Detective Huller did not know whether the driver was Paul Labriola. Observations were also made on June 20 and June 23. The defendant's car was not seen on those days (Huller: 142, 147, 150, 154-57, 169-73, 175, 310, 312, 323, 329, 340; Bocina: 73-74, 78, April 2, 1974 at 16-18; Peo's. Exh. 5).

Having gathered this information, a number of factors led Mr. Newman to conclude that Martino and Principie were not working alone, and that a wiretap would yield evidence about others involved in the scheme, as well as further evidence of Martino's and Principie's guilt. These factors included the "almost * * * private" character of the Club, the fact that Martino and Ralph spoke openly in the Club about the sale of stolen bonds, and Martino's use of the code name "Paul." Martino's request that the informant leave a message for "Paul" if he was not there indicated that others in the Club were aware that he was using the name Paul. From the information furnished to him, including Martino's statement to Mr. Reinhardt that a "package" of Industrial Bonds would become available in the future, Mr. Newman concluded that Martino was

merely a "final passer" and that there was an "inside man" at the brokerage firm who was acquiring the bonds (Newman: 13, 29-41, 46, 51-55, 57-59, 61). Based upon the foregoing information and analysis, Assistant District Attorney Newman decided to apply for a warrant to intercept telephone conversations communicated to and from the 1234 Club.

The First Warrant: July 5th-July 27th

On July 3, 1972 District Attorney Frank S. Hogan applied to Supreme Court Justice LARRY VETRANO for the issuance of an electronic eavesdropping warrant to intercept calls transmitted over the telephone at the 1234 Club. As described above, in the supporting affidavit, Assistant District Attorney Newman related that on June 16, 1972 Martino first offered the Postal Bearer Bonds to the informant. Newman also included in the affidavit a description of the informant's June 20 conversations with Martino and a subsequent conversation of June 25, 1972, during which Martino said he had one Postal Bearer Bond left, but that he had a "package" of Industrial Bonds for sale worth $175,000. Finally, the prosecutor related his conversations with Postal authorities and the brokerage firm of Dupont, Glore, Forgan, and the Police Department's observations of the 1234 Club. (*See* Peo's. Exh. 1, Warrant of July 5, 1972.)

On July 5, 1972 Justice VETRANO signed an order permitting the interception of the telephone communications "of Joe Martino, his coconspirators, agent and associates" concerning the crimes of grand larceny in the second degree, criminal possession of stolen property in the first

degree, and conspiracy to commit these crimes. The interception was to terminate on August 3, 1972. (*See* Peo's. Exh. 1, Warrant of July 5, 1972.)

Pre-Wiretap Minimization Instructions

On July 5, 1972 Sergeant **Rosario Bocina** of the District Attorney's Office Squad instructed the officers who were to monitor the intercepted conversations that they were to listen to the conversations of "Joseph Martino* also known as Paul * * * [a]nd Ralph and their coconspirators." They were to listen for a "reasonable time" to identify the voice or hear someone identify themselves as a person named in the warrant. During this monitoring, if they heard a conversation relating to the crimes under investigation, they were to listen to the conversation because "this might very well be the conversation of a coconspirator." The officers were not to listen to any privileged conversations or to any "social" conversations, and they were not to "go on any fishing expedition" (Bocina: 36, 63-64, 65-72, 75-76, 81, 86; Huller: 160-64, 293-98, 300-303).

Interception Begins: July 11

Although the wiretap was installed on July 6th, interception did not begin until July 11th because the telephone at the 1234 Club was not working (Huller: 167-68). Be-

* Detective Huller and the other officers assigned to monitor the conversations were instructed to listen to the tapes of June 20 between Mr. Reinhardt and Martino to familiarize themselves with the voice of Joe Martino. This conversation had been recorded with the consent of Reinhardt. Detective Huller testified that he did so (Bocina: 38; Huller: 131). Detective Boyle was present when they were recorded. (*See* Peo.'s Exh. 6A.)

tween July 11th and July 14th the monitoring officers heard several conversations between an unidentified individual referred to as "Paul," which concerned the sale and negotiation of stolen bonds. (At the time these conversations were overheard the police had not yet discovered that Paul Labriola was involved in the conspiracy.) For example, on July 11th, a conversation was recorded between "Paul" and Leo, identified as Leon Hunter, which Detective Huller termed a "criminal conversation" about stolen securities. During this conversation, Hunter said he had "the machine" and "Paul" said he had "the pieces." "Pieces" was a term Joe Martino had used in an earlier conversation to refer to the bonds he was offering for sale. (*See* Peo's. Exh. 6a, Transcript of June 20, 1972 conversation, 8:30 p.m.) "Paul" added that although he had "the pieces," he didn't have "the i.d.s.," which Detective Huller testified might have referred to the individuals who would attempt to "pass" the securities (Peo's. Exh. 4A2; Huller: 186-87).

At the same time as these conversations were being monitored, visual surveillance of the 1234 Club continued. On July 6th, Detective Huller observed that one of the cars outside the 1234 Club was registered to Paul Labriola. The detective also observed Labriola, whom the officer was by then able to identify, take something out of the car and go into the Club. The detective was able to identify Labriola because another officer had shown him a picture of the petitioner sometime after June 21. On July 11th, Labriola's car was again seen parked in the vicinity of the 1234 Club (Huller: 168-70, 173; Peo's. Exh. 5).

On July 12, at 4:45 p.m., during the course of interception, Detective Huller overheard a brief conversation be-

tween "Paul," the party at the Club, and "Leon," in which the latter asked Paul to meet him at a luncheonette on Coney Island Avenue. Five minutes later, Paul Labriola left the Club, drove to Coney Island Avenue and went into a luncheonette there. He was observed speaking to an unknown individual. Later that day, Detectives Boyle and Huller discussed the possibility that the individual whose voice they had heard at 4:45 p.m. was Paul Labriola and not Joe "Paul" Martino. However, Detective Huller was not sure that Labriola was the speaker, because Huller had never heard his voice. No conversations covered by the warrant were recorded on July 13 (Huller: 340-43, 345-47; Peo's. Exh. 4A2).

Labriola Is Identified as a Co-conspirator: July 14th-27th

As a result of a conversation intercepted on July 14, the monitoring officers became "positive" that one of the voices they were recording was that of Paul Labriola (Huller: 196). This was a three-way conversation. Joe Martino called from an outside telephone to Ralph Principie and the petitioner, who were in the Club (Peo's. Exh. 4A3; Reel 3311). At the outset of the conversation, Martino asked Principie about "the guy from Canada," apparently referring to informant Stanley Reinhardt. Principie mentioned that Reinhardt was planning to "leave," and then turned the telephone over to Labriola because "he'll know more than me." Martino and the petitioner then talked about whether Labriola could get "those samples" and Labriola attempted to clarify whether he meant the "samples" from "Hayden." Detective Huller interpreted this as a reference to Hayden & Stone, a brokerage firm. Martino said that he meant the "other incident," the "half dollars."

Labriola also mentioned "those 3 things, the big ones" and "those 3 pieces," which Detective Huller interpreted to be a reference to the Postal Bearer Bonds which had been offered to Reinhardt. (*See* Warrant of July 5th, Supporting Affidavit of Leonard Newman) (Huller: 210, 223-26, 263-65).

From this conversation, Detective Huller concluded that Labriola was an "integral part of this conspiracy." He told Sergeant Bocina that Paul Labriola was a party to the July 14th conversation and Bocina relayed this information to Assistant District Attorney Charles Clayman, who had been placed in charge of the investigation. Mr. Clayman said that it was not necessary to amend the warrant to add Labriola's name, and that they could "put it on the renewal" which was "coming in a short time" (Huller: 265-66; Bocina: 50).

As Sergeant Bocina had instructed him, Detective Huller continued to monitor conversations to which Labriola was a party. Additional conversations about the sale and negotiation of stolen bonds were recorded between July 14th and July 27th (Huller: 266-68).*

The Petitioner's Case at the Suppression Hearing

The Second Warrant: July 27th, 1972

Assistant District Attorney **Charles Clayman** testified that he began drafting an eavesdropping order naming Paul Labriola on July "20 or 21st," before the termination

* Recordings of these conversations were submitted to the court below *in camera*. The assistant district attorney at the suppression hearing offered to allow defense counsel to examine the transcripts of these conversations (276-8).

date of the first order on August 3. Mr. Clayman's supporting affidavit was dated July 27, 1972, and signed by Justice VETRANO on that day. It also included a provision for the installation of a "bugging" device, to be operative daily until 7:30 p.m. (Clayman: 361-64, 385-86; *see* Warrant of July 27th, 1972).

Probable cause for the second warrant as to Paul Labriola was demonstrated, in part, by two conversations intercepted during the execution of the first warrant. The affidavit contained the contents of these conversations and an explanation of their meaning by Detective Huller, based on his experience in the investigation of securities frauds. Wtih respect to a conversation of July 21st, 1972 between the petitioner and one "Leon," Detective Huller concluded that Labriola was discussing "stamps used to validate stolen bonds, securities and checks to render them negotiable." (*See* Affidavit of Charles E. Clayman in Support of July 27th Warrant, paragraph 2b). A second conversation to which Labriola was a party pertained, according to Detective Huller, to "the shipment of stolen securities and bonds through the mail and possible acquisition by Paulie of $200,000 dollars worth of stolen securities. * * *" *Id.* at 2(c). Conversations to which "Ralph" and Joe Martino were a party were also intercepted and described. On July 27th, 1972 Justice VETRANO approved the People's application to intercept the telephone conversations of "Joe Martino, Paul Labriola and Ralph, their coconspirators, agents and associates." In addition, Justice VETRANO permitted the installation of a bugging device inside the 1234 Club provided that the interception of conversations not occur

after 7:30 p.m. on any day. Order of Justice VETRANO, July 27th, 1972, at 2.*

The Hearing Court's Decision

At the conclusion of the suppression hearing, the court denied petitioner's motion to suppress evidence obtained as a result of the eavesdropping warrants of July 5th and July 27th. Justice ROBERTS concluded that under *United States* v. *Kahn*, 415 U.S. 143 (1974), officers could intercept Labriola's conversations under the July 5th warrant because petitioner was a co-conspirator and the warrant authorized interception of conversations of co-conspirators. The court rejected Labriola's further contention that as soon as his identity became known, the District Attorney was required to amend the July 5th warrant. The court also found that the petitioner's conversations regarding industrial bonds were covered by the July 5th warrant because the supporting affidavit specifically named industrial bonds, and that, in any event, the order was "unrestricted as to the exact

* The District Attorney applied for a third eavesdropping warrant on September 11, 1972, naming Joe Martino, Paul Labriola, "Ralph," their co-conspirators, agents and associates. That warrant added criminal possession of a dangerous drug in the third degree and conspiracy to commit this crime to the list of crimes about which conversations could be intercepted, and postponed notice under the prior warrants until termination of this third warrant. On September 11, 1972, Justice VETRANO approved the application. On September 26, 1972 a further application was made to intercept the conversations of the same parties at the Say Hi Lounge in Brooklyn, because the 1234 Club had been closed by the State Liquor Authority. (*See* Affidavit of Charles E. Clayman of September 26, 1972, paras. 5-9.) Another order, omitting the drug crime, was issued by Justice VETRANO on September 27, 1972 for the telephone at the Say Hi Lounge. A fifth order was issued by Justice MILTON MOLLEN on October 28, 1972. Paul Labriola was arrested on December 5, 1972 (Bocina: 90).

species of stolen securities." Finally, Justice ROBERTS decided that the monitoring officers were properly instructed concerning minimization and that they "exercised exemplary good faith" in executing the orders. (Appellant's Appendix, at A 70-A 74.)

The Motion to Re-open the Hearing

On March 14, 1972, Labriola moved to reopen the hearing to raise, for the first time, issues with respect to the "bugging" of the 1234 Club authorized under the warrant of July 27th and the purportedly untimely notice of the eavesdropping given to petitioner by the People on December 13, 1972. (*See* Agreed State of Facts of April 7, 1975.)

In an affidavit in support of this motion, defense counsel referred to the decision of Hon. MARK CONSTANTINO in the United States District Court for the Eastern District of New York, where Labriola was also under indictment, on a motion to suppress the same intercepted conversations. In that decision, Judge CONSTANTINO suppressed all conversations overheard after 7:30 p.m. pursuant to the "bugging" order of July 27, 1972. In addition, Judge CONSTANTINO held that no notice was given within 90 days after termination of the eavesdropping orders, but that Labriola was not prejudiced by the delay. (*See* Opinion of Judge CONSTANTINO in *United States* v. *Principie*, 73-CR-972.)

Labriola's motion papers explained why these issues were not raised at the suppression hearing. Counsel's affidavit recited that, upon the defendant's request for the logs prepared pursuant to the bugging order, the prosecutor said that he did not intend to offer as evidence any

conversations obtained as a result of the bugging. Labriola has at no time disputed the prosecutor's representation. In addition, with respect to the issue of statutory notice, counsel stated that he was "not aware" that notice had been untimely because he had "come into the case after the motions had been made by prior counsel," and the defendant's "Original motion papers" did not contest the timeliness of the notice. (*See* Supporting Affidavit of Robert I. Weisswasser). On March 14, 1975, the court denied the motion in all respects as being "not timely." Minutes of March 14, at 2.

On May 14, 1975 the District Attorney consented to reopening the hearing only on the issue of whether notice of the eavesdropping order was timely. The court found that notice was properly given within 90 days of the termination of the September 11 warrant, pursuant to Criminal Procedure Law Section 700.50.

ARGUMENT

This petition raises four questions: (1) Did the warrant authorize interception of petitioner's conversation even though he was not named in the warrant and did the People have to add petitioner's name to the warrant immediately after discovering that petitioner was a co-conspirator of persons whose conversations were authorized to be intercepted; (2) Was there probable cause to issue the July 27th warrant; (3) Was notice of the eavesdropping timely; and (4) Did the hearing court erroneously deny petitioner's motion to reopen the hearing to challenge whether electronic surveillance had been conducted beyond the 7:30 p.m. limit provided for in the warrant.

1. The July 5th eavesdropping warrant authorized interception of the conversations of Paul Labriola therefore it was unnecessary to amend that warrant.

New York Criminal Procedure Law section 700.65 (subd. 4) provides that when in the course of properly executing an eavesdropping warrant, the police overhear conversations the interception of which was not authorized by the warrant, then those conversations may not be introduced in evidence unless an amendment of the warrant is obtained as soon as practicable (*accord,* 18 U.S.C. §2517[5]).* Petitioner contends that since the warrant did not authorize interception of his conversations, the conversations intercepted were inadmissible because no amendment was ever obtained.

However, the warrant did in fact authorize the interception of petitioner's conversations. The July 5th warrant authorized interception of the conversations of "Joe Martino, his co-conspirators, agents and associates and 'Ralph' * * *" about the "procurement and disposition of stolen securities" relating to conspiracy to commit the crimes of grand larceny and criminal possession of stolen property.

That Labriola was a "co-conspirator" was amply demonstrated by the "three-way" conversation intercepted on July 14th between Ralph Principie, Joe Martino and Paul Labriola. This conversation demonstrated Labriola's in-

* New York Criminal Procedure Law section 700.65 (subd. 4) is virtually identical to 18 U.S.C. 2517(5). Title 18, section 2516(2) of the United States Code authorizes state legislatures to pass statutes governing electronic surveillance, but only if that legislation provides, at a minimum, the safeguards contained in the federal statute. Consequently, failure to comply with a state statute which provides the minimum protection required by the federal statute, would raise a federal question which could be reviewed by this Court.

volvement in the very criminal transaction which served as the basis for the warrant.

Moreover, the intercepted conversations of Labriola concerned the shipment of stolen securities and bonds through the mail, and the future acquisition by Labriola of additional stolen securities. Thus, these conversations refer to the sale and negotiation of stolen securities, the specific pattern of criminal activity covered by the warrant. True, these conversations may have concerned different transactions than the original transactions under investigation. But, the intercepted conversations were of the same type and nature as those specified in the warrant; and it is well settled that no greater specificity is required. *See United States* v. *Tortorello,* 480 F.2d 764, 780 [2d Cir. 1973], *cert. denied,* 414 U.S. 866 [1973]; *United States* v. *Armocida,* 515 F.2d 29, 37 [3d Cir. 1975], *cert. denied,* —— U.S. ——.*

Thus, there is no doubt that Labriola's conversations were authorized to be intercepted. Consequently no amendment was required. *United States* v. *Principie,* 531 F.2d at 1137-38, *supra; United States* v. *O'Neill,* 497 F.2d 1020, 1023 [6th Cir. 1974]; *People* v. *Gnozzo,* 31 N.Y.2d 134, 142 [1972], *cert. denied* 410 U.S. 943 [1973]. The only requirement that had to be met was that petitioner be named in the application and the warrant if he was "known" to be a co-conspirator (N.Y.Crim. Proc. Law §§700.20[2][b][iv], 700.30[4]; 18 U.S.C. §§2518[1][b][iv], [4][a]; *see United States* v. *Kahn,* 415 U.S. 143 [1974]). t is undisputed that at the time of the first application petitioner was not known to be a co-conspirator. After his participation as a co-conspirator became known, he was named in the subsequent

* Certiorari was denied with respect to a co-defendant, —— U.S. ——, 96 S.Ct. 111 (1975), but it is unclear whether the specificity issue was raised.

warrants, as required by statute. There is no statutory requirement, nor does petitioner cite any case which requires, that if the identity of a co-conspirator is discovered during the course of interception, then the order which authorized that interception must be changed immediately to include the name of the newly discovered co-conspirator.

Petitioner cites no division either among the circuits or state courts about the standard by which to determine whether intercepted conversations are within those authorized to be seized and when an amendment is required. The Second Circuit has held that the warrant in this case authorized interception of petitioner's conversations. *United States* v. *Principie,* 531 F.2d at 1137-38. Consequently, the petition presents no substantial constitutional question for this Court's review.

2. The July 27 warrant was issued upon probable cause.

Petitioner next contends that the July 27th warrant was not supported by probable cause to believe that interception of the conversations of Paul Labriola "would yield material evidence of * * * Grand Larceny in the Second Degree, Criminal possession of stolen property in the First Degree and conspiracy * * * pertaining to the disposition and acquisition of stolen securities and bonds."

Petitioner's conversations which were set forth in the affidavit in support of the July 27th warrant clearly established probable cause. For example, petitioner referred to "that little stamp," which he acknowledged had a "date" and that petitioner had "the blank," for which he was looking for someone to "type * * * up" (Affidavit of Charles Clayman of July 27 at 4-5). In the expert opin-

ion of Detective Huller, which was also part of that affidavit, the "stamp" with a date referred to an instrument for the validation of stolen securities, and petitioner's further statement, "something real big in the broke," referred to the theft of securities from a brokerage firm.

The interpretations of petitioner's conversations and the conversations themselves prompted both the Appellate Division, in affirming without opinion, and the Second Circuit more explicitly, 531 F.2d at 1138-1139, to hold that there was probable cause to issue the July 27th order. Ten judges in the federal and state appellate and trial process have found that the July 27th warrant was supported by probable cause. Given these decisions and the narrow probable cause question presented, the issue is not one which merits further review by this Court.

3. Defendant received timely notice of the eavesdropping orders.

In the course of this investigation, five eavesdropping orders were obtained. The first of these was dated July 3, 1972. The second order, entitled an order renewing and amending, was dated July 27, 1972. The second eavesdropping order expired on September 2, 1972. A third order was issued on September 11, 1972, and was to expire on October 10, 1972. However, this third order was renewed and amended on September 27th to cover a different telephone because the conspirators had moved their base of operation. This September 27th authorization was renewed once on October 28th, and expired on November 26th. Petitioner was served with notice of the eavesdropping on December 13, 1972.

Both New York and federal law require notice with 90 days of termination of an order or an extension of that order (N.Y. Crim. Proc. Law §700.50[3]; 18 U.S.C. §2518 [8][d]). Petitioner contends that, with respect to the first and second orders, the notice he received was not timely. Therefore, he says, his conversations overheard pursuant to these orders should have been suppressed.

Petitioner is correct in his assertion that he received notice more than 90 days after expiration of the second order. But, the ninety-day notice period is subject to two exceptions, both of which are applicable here. Section 700.50 (subd. 4) of New York's Criminal Procedure Law authorizes the issuing judge, upon a showing of exigent circumstances, to postpone notice for a reasonable time. Petitioner does not challenge this provision. In the September 11th (third) order, the issuing judge postponed notice of the first and second orders until termination of the third order.* That third order was renewed and amended on September 27, 1972. That renewal expired on or about October 27th. Even assuming that the September 11th (third) order terminated on the 27th of September, the December 13, 1972 notice was given 77 days after termination, within the ninety-day requirement. Based upon the order postponing notice, the hearing court (Roberts, J.) denied the motion to suppress and held the notice timely.

The second reason for holding the notice timely was given by the Second Circuit in its opinion reviewing petitioner's federal conviction. (531 F.2d at 1142-43). De-

* Petitioner does not contend there was an insufficient factual showing to postpone notice.

spite the nine-day hiatus between the second and third orders, the Second Circuit held that the third order was in fact an extension of the second order. That court reasoned that the intention of the statute in postponing notice until after expiration of extensions was to defer notice until completion of an investigation. The nine-day lapse between the second and third orders could not change the fact that there was still only one investigation. Consequently, according to the Second Circuit, time for computing notice was to be measured from November 26, 1972, and the December 13th notice was timely.

Finally, petitioner fails to allege that he was prejudiced by the allegedly untimely notice. If the notice was not timely, then there would be a question whether suppression would be the proper remedy in the absence of prejudice to the petitioner.* However, since the notice was timely, that question is not presented here.

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* This Court has recently granted certiorari in one case where it was held, *inter alia*, that, despite the absence of prejudice to a defendant, the failure to comply strictly with the notice provision required suppression of intercepted conversations. (*United States* v. *Donovan*, 513 F.2d 337, 343-44 [6th Cir. 1975], *cert. granted* —— U.S. ——, 96 S.Ct. 1100 [1976]. Certiorari has also been sought in a second case involving, *inter alia*, the failure to give notice timely: *United States* v. *Bernstein*, 509 F.2d 996, 1004 [4th Cir. 1975] [pet. filed 5/27/75].) Other circuits have held that if the purposes of notice are fulfilled and the defendant suffers no prejudice, strict compliance with the notice provision is unnecessary (*see, e.g., United States* v. *Bohn*, 508 F.2d 1145 [8th Cir. 1975], *cert. denied* 421 U.S. 947 [1975]; *United States* v. *Rizzo*, 492 F.2d 443, 447 [2d Cir. 1974], *cert. denied* 417 U.S. 944 [1974]; *United States* v. *Iannelli*, 477 F.2d 999, 1003 [3d Cir. 1973], *aff'd* 420 U.S. 770 [1975]).

4. The court's denial of the untimely motion to re-open the suppression hearing rests upon an adequate state procedural ground.

The second eavesdropping order, dated July 27, 1972, authorized installation of a "bugging" device inside the 1234 Club, and permitted the interception of conversations inside the club every day until 7:30 p.m. At the suppression hearing, petitioner raised no issue with respect to the bugging. However, on March 14, 1975, subsequent to his plea of guilty and the imposition of sentence, petitioner moved to reopen the hearing to introduce logs of the bugged conversations, which he claimed indicate "continuous bugging after 7:30 p.m." in violation of the July 27th eavesdropping order.* In motion papers, petitioner explained that this issue had not been raised at the hearing because the prosecutor informed defense counsel that he did not intend to offer as evidence any conversations obtained as a result of the bugging. The court denied Labriola's motion to reopen the suppression hearing and refused to consider the merits of his contention because the motion was "not timely made."

New York State Criminal Procedure Law section 710.70 [subd. 3], provides that a defendant who does not move to suppress evidence obtained as a result of eaves-

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* The petitioner appended to his motion a decision by the Hon. Mark Constantino, Judge of the United States District Court for the Eastern District of New York, on the legality of the same wiretap orders in connection with another indictment pending against defendant in that court. Judge Constantino suppressed all conversations obtained in violation of the 7:30 limitation but refused to suppress other conversations lawfully seized under the eavesdropping warrants. *United States* v. *Principie*, 531 F.2d at 1139. The United States Court of Appeals for the Second Circuit did not disturb this holding. *Id.* at 1139-41.

dropping "before or in the course of a criminal action waives his right to judicial determination of any such contention." A criminal action is deemed terminated upon imposition of sentence (N.Y. Crim. Proc. Law §1.20 [16]). The hearing court concluded that the motion made after defendant had been sentenced, was "not timely made," and refused to reopen the hearing. The New York statutory scheme like the federal provision (Fed. R. Crim. P. 12 [f], and other state statutes, is designed to bring finality to litigation and to insulate convictions from challenge at a time when reprosecution would be difficult if the challenge were successful. The validity of the state interest in this regard has been recognized by this Court (*see e.g., Francis* v. *Henderson,* —— U.S. ——, 96 S. Ct. 1708 [1976]; *see also Davis* v. *United States,* 411 U.S. 233 [1973]). Thus, the denial of petitioner's motion rests upon an adequate state ground thereby precluding review by this Court (*see Henry* v. *Mississippi,* 379 U.S. 443, 446 [1965], *reh. denied,* 380 U.S. 926 [1965]; *Herb* v. *Pitcairn,* 324 U.S. 117, 125-126 [1945]).

In any event, even assuming that the hearing court had granted the motion to reopen and found that conversations had been intercepted beyond the 7:30 limitation, petitioner's contention that all conversations, including those lawfully intercepted, clearly lacks merit. The proper remedy is the suppression of only those conversations unlawfully intercepted. *See People* v. *Gnozzo,* 31 NY2d 134, 141 (1972); *United States* v. *Cox,* 462 F.2d 1293 (8th Cir. 1972), *cert. denied,* 417 U.S. 918 (1974), *reh. denied,* 419 U.S. 885 (1974); *United States* v. *Scott,* 516 F.2d 751, 760 fn. 19 (D.C. Cir. 1975) (dictum); *United States* v. *LaGorga,* 336 F. Supp. 190, 197 (W.D. Pa. 1971); *United States* v. *Mai-*

nello, 345 F. Supp. 863, 875-7 (E.D. N.Y. 1972); *United States* v. *Leta,* 332 F.Supp. 1357, 1360 (M.D. Pa. 1971); *United States* v. *King,* 335 F. Supp. 523, 543-4 (S.D. Cal. 1971), *rev'd on other grounds,* 478 F. 2d 494 (9th Cir. 1973), *cert. denied,* 417 U.S. 920 (1974); *United States* v. *Tortorello,* 480 F. 2d 764, 775 (2d Cir. 1973).

To the extent that there is any controversy about this remedy (*compare* cases cited in preceding paragraph *with United States* v. *Focarile,* 340 F. Supp. 1033, 1046-7 [D. Md. 1972], *aff'd on other grounds* 469 F.2d 522 [4th Cir. 1972], *aff'd* 416 U.S. 505 [1974]), this case is not representative of the way in which the issue usually arises. Thus, this is not a good case in which to resolve that controversy. As the Second Circuit noted:

[8] Whatever view we may take of this controversy in the abstract, we note that this case is somewhat different from those discussed above. The police in this case violated not the general, statutorily-required injunction to minimize interception of innocent conversations, but rather a specific aspect of the order prohibiting interception of *any* conversations after 7:30 P.M. This significantly alters the considerations on each side. The Government cannot make the argument that the police were trying in good faith to make delicate judgments about which calls were innocent and which incriminating; the violation of the order was by its nature blatant and apparently extensive as well. On the other hand, the most persuasive argument favoring across-the-board suppression does not apply in this case—the district judge here suppressed evidence that could be useful to the Government as well as conversations that were innocent. To that extent, the suppression already ordered should have a deterrent effect. Moreover, we are less inclined to use the drastic rem-

> edy of suppressing conversations that were themselves seized legally because other conversations were seized in violation of a minimization order, where the minimization order in question is a limited one whose purpose has never been made clear to us, than we might be in the case of the usual minimization order, which embodies a statutory requirement central to the policy of Title III. In the unique circumstances of this case, we conclude that only those conversations which were seized in violation of the time limitation in the order had to be suppressed. *United States* v. *Principie*, 531 F.2d at 1140-41, *supra*.

As demonstrated above, even if petitioner could obtain review of the denial to reopen the suppression hearing, there is presented no substantial and significant constitutional question. More importantly, this Court has no jurisdiction to review the hearing court's refusal to reopen the hearing because it was based upon a state statute and not the Constitution or any federal statute.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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